SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 19

FRANK ROBERTS,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

BENTON LITTLETON BRICKELL,
Attorney at Law,
Decatur, Alabama,
Solicitor of Record for Petitioner.

NEWTON B. POWELL,
Attorney at Law,
Decatur, Alabama,
Of Counsel for Petitioner.

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Statement.

The petitioner files this reply brief and argument after the filing of the Government's brief and argument in this case.

The petitioner was sentenced, after a plea of guilty, to a term of two years in prison, and to the payment of a fine of $250.00, on a charge of stealing cigarettes from an interstate shipment, and having such property in his possession, knowing that it was stolen. This sentence was made on April 26th, 1938, after the plea of guilt was entered on

April 25th, 1938 (R. page 2 & 3). The District Court suspended the execution of the prison sentence for a period of five years, but required the payment of the fine of $250.00, and this fine was paid. During the probation period the Court revoked the probation, and added one year to the sentence originally imposed, making the sentence three years instead of two years. The petitioner appealed the case to the Fifth Circuit Court of Appeals, urging that his constitutional right under the Fifth Amendment of the Constitution, of freedom from double punishment for the same offense was infringed by the addition of the year to the sentence in view of the fact that the sentence had been partially executed.

Jurisdiction.

The jurisdiction of the Supreme Court in this matter is properly stated in the Government's brief, page 1.

Argument.

It is admitted in the Government's brief that the Federal courts had had no authority to change a sentence and impose a heavier one upon a prisoner after a part of the sentence had been executed prior to 1925 (the adoption of the Probation Statute). They admit that the cases of Ex parte Lang, 18 Wall. 163 and *U. S. v. Mayer*, 235 U. S. 65, and other cases cited by the Petitioner heretofore so held (Brief 11 and 12). They further admit that this was the law with reference to such cases whether the "Punishment" imposed was imprisonment or a fine, or a fine and imprisonment, and authorities are cited holding this to be the law. There must be a reason for this, and this reason, as pointed out in the cases cited was that Article V of the Constitution prohibits the double punishment of an offender for the same offense. Since both the Petitioner

and the Government agree on this proposition as being the law up until 1925, let us search for the authority which the Government says has changed this law with reference to the case at bar. The Government offers the following as the authority, which changed this proposition, allowing the increase of punishment after a part of the sentence had been executed:

> "It is our position that the Probation Act did, properly, permit a severance of the ancient tie between fines and imprisonments, and that it is this severance which furnishes the key to the resolution of the problem presented by the petitioner" (Brief p. 13).

In other words, the Probation Act changed the law, and made it possible to increase a sentence on a prisoner on probation, even though a part of the sentence had been executed by the payment of a fine, which was a part of the same sentence and judgment as the prison sentence. This argument means that an act of Congress can change the Bill of Rights if we understand the argument of the Government. No argument is needed to show that it was impossible for Congress alone, to change this law if it was the Constitution which laid it down.

The Government urges by inference that the placing of a "Split sentence" that is, a fine and a prison sentence, and requiring the execution of one part of the split sentence, and suspending the other that the fact that it is a "Split sentence" frees the trial Court to handle the execution of each part of the sentence as it may see fit without regard for the Constitution (Brief 17-20). But can it be denied that the fine imposed is punishment for the offense? If it is (and the Petitioner and the Government agree that it is) we must find something in the Constitution, which would, at least by inference, authorize the imposition of "split sentences" on prisoners

at the will of the trial courts without regard for the prohibition against double punishment, which is condemned by the Fifth Amendment. This amendment says:

> "• • • nor shall any person be subjected for the same offense to be twice put in jeopardy of life or limbs • • •".

All the cases hold that this prohibits double punishment, and the parties to this cause agree on this fact (Gov't. Brief, P. 2, n. 1) since it is punishment for a prisoner to be required to pay a fine, there is a partial execution of the sentence imposing this fine if and when it is paid, regardless of whether or not the imprisonment part of the sentence is suspended or executed. To hold otherwise would be illogical and would do violence to the Fifth Amendment, and would open the way for the elimination of the Bill of Rights by construction. The Government admits that the trial court could not have added any thing to this petitioner's fine when his probation was revoked (Brief, P. 20). Their reason for agreeing that the trial court could not do this is not given, but I assume that they would admit that this would violate the Fifth Amendment. If so, they admit that the payment of this fine of $250 is such punishment as is prohibited by the Fifth Amendment from being imposed twice upon a person for the same offense, and the prisoner has entered upon his punishment when the fine is paid whether it be by "split sentence" or otherwise. We are constrained to believe after a diligent search of the history of our Constitution that the makers of the Constitution knew nothing of "split sentences", and did not intend to except them from the operation of the Fifth Amendment in prohibiting double punishment.

As we understand the Government's theory of "Split sentence", they contend that there are two sentences im-

posed upon the prisoner in a case of this kind, one being the fine and one being the imprisonment; and on second thought we know that this is not their theory, because if there were two sentences that, itself, would violate the Fifth Amendment. We must, therefore, return to the theory that the "split sentence" is but one sentence, and when we return to this theory it is just as any other sentence, and there is no constitutional authority for construing it any differently than it would be construed if there had been no fine in the case, but the prisoner had been sentenced, and had entered upon his term and had partially executed the sentence (as by paying the fine in this case) and the trial court had called him back before it and increased the sentence originally given him.

The Probation Act is a worthy act, providing a sound and sensible authority for dealing with a certain class of law violators; we agree with all the things said by the Government expounding the virtues of the Act. It is probably the greatest advancement made in dealing with criminals in many decades; we do not think the act is unconstitutional, but that part authorizing the trial court to impose any sentence that might have originally been imposed was never intended to apply to in those cases where the sentence has been partially executed as in this case. To so construe the act would make it unconstitutional. The act still remains, and the trial court has the power to revoke probation, and commit the prisoner to prison, to impose fines upon the revocation of probation if the sentence has not been partially executed before by the payment of a fine or serving time or otherwise, and to increase the punishment first imposed on the violator of his probation in case the sentence has not been partially executed as mentioned above. But the trial court would not have authority, and has never had authority, and can never have the authority until the Constitution is changed.

to sentence a prisoner, and after putting him on probation, collect a fine, and then increase his sentence after it is partially executed. Even the convict is protected by the Constitution; he has the right to know what punishment he is to receive for his violation of the laws of his government.

Much is said in the Government's brief about the intention of Congress in passing the Probation Act. We can not see that the intention of Congress, whatever it may have been, can aid the Government's contention in this case, as the matter is governed by the Constitution, and the act of Congress could not change the Constitution. It must be assumed, however, that Congress did not intend to pass any law which would conflict with the Fifth Amendment or any other part of the Constitution and this presumption is the basis of our contention in this case.

We are reminded of the fact that the Federal Probation Act is taken from N. Y. and Mass. acts. We call the attention of the Court to the several cases from these two distinguished districts quoted from below; it is evident from these cases that the highest courts of these jurisdiction are very jealous of the rights of a citizen under the Constitution.

A fine is pecuniary punishment for the commission of a crime or misdemeanor. *Hart* v. *Norman*, 155 N. Y. S. 238, 240; 92 Misc. 185.

A fine is pecuniary punishment for an offense, inflicted by sentence of court having authority to impose it. *Wilcox* v. *Knoxville Borough*, 2 Pa. Dist. R. 721, 725.

A fine is defined as a pecuniary punishment imposed by a lawful tribunal on a person convicted of a crime or misdemeanor. *Holliman* v. *Cole*, 34 P. 2d 597, 598, 168 Okla. 473.

A fine is a sum of money exacted as a pecuniary punishment from persons guilty of an offense, and is in its

nature at least, a penalty. *Nergman* v. *State*, 60 Pac. 2d. 699, 700, 187 Wash. 622, 106 A. L. R. 1007.

A fine is a pecuniary punishment imposed by a lawful tribunal upon a person convicted of a crime or misdemeanor. *U. S.* v. *Mitchell*, 163 Fed. 1014, 1016.

Many such definitions from various jurisdictions under title of "Fine" in Words and Phrases, vol. 17, page 36.

ARTICLE V, CONSTITUTION OF U. S.

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; *nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;* nor shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life, libetry, or property without due process of law; nor shall private property be taken for public use, without just compensation."

The Fifth Amendment protects against double punishment as well as against double trial. *Kepner* v. *U. S.*, 195 U. S. 100, 24 SCt. 797, 49 L. Ed. 114, 1 Ann Cas. 655; *U. S.* v. *Yam Tung Way*, 21 Philippine 67; *Com.* v. *Valey*, 63 Pa. Super. 489.

Although the prohibition strictly applies only to felonies, the Courts have been guided by the spirit, rather than the letter of the law, and have applied it to all indictable offenses including misdemeanors. Ex Parte Lange, 18 Wall. (U. S.) 163, 21 L. Ed. 872; *Berkowitz* v. *U. S.*, 93 Fed. 452, 35 C. C. A. 379.

"The signification of the word 'jeopardy' in its common use is exposure to death, loss, or injury, hazard, danger, peril." *State* v. *Connor*, 45 Tenn. (5 Cold.) 311, 317; Ex parte Glenn, 111 F. 257, 258.

"It is well settled that a trial court is without power to set aside a sentence after the defendant has been committed thereunder, and impose a new and different sentence increasing the punishment, even at the same term at which the original sentence was imposed. A judgment which attempts to do so is void, and the original judgment remains in force." *Hickman* v. *Fenton*, 231 N. W. (Neb.) 510, 70 A. L. R. 819. There is an annotation following this case in A. L. R. supplementing the one in 44 A. L. R., and this annotation states that the above case is in accord with the rule laid down in the annotation in 44 A. L. R. 1203. This was a case where a man was sentenced after conviction to a term of from three to five years for incest; he served 43 days, and it was discovered that the minimum sentence that should be imposed for incest was 20 years; the Court called him back for another sentence, giving him 25 years. The Court on appeal of a habeas corpus petition held the sentence of 3 to 5 years erroneous, but not void, and it was contended by the prisoner that to allow the second sentence would put him in jeopardy twice for the same offense in violation of the provision of the state constitution, which followed the same wording as our Federal constitution.

In the case of *Miller* v. *Snook* (1926, D. C.) 15 Fed. (2d) 68, where the Court attempted to change a sentence 14 days after the original sentence was pronounced by *reducing* the sentence, rather than raising it, the Court said:

> "The general rule is that any time during the term the Court has power to reconsider its judgment, and to revise and correct it by mitigating and even by increasing its severity, where the original sentence has not been executed or put into operation. Where the defendant, however, has executed or entered upon the execution of a valid sentence, the Court cannot, even during the term at which the sentence was rendered, set aside and render a new sentence, nor can it amend the judgment so as to be in effect a new sentence."

Annotation, 70 A. L. R. 817.

Cited in the annotation on this point in 44 A. L. R. 1202 as holding the same as Ex Parte Lange (21 L. ed. 872, 18 Wall. 163), is another Federal case, and it is the only Federal case cited; it is Re. Johnson (1891; C. C.) 46 Fed. 477.

Numerous cases from most of the states of the union are cited holding to this effect in this citation.

The following is the reason for the rule as laid down by the N. Y. Court:

> "The objection to the exercise of such power by the Court is that, could it be exercised, a defendant, in violation of his constitutional rights, might be punished twice for the same offense; first by undergoing imprisonment under the first sentence, and then by undergoing imprisonment under the second sentence." People *v.* Sullivan, 54 Misc. 489, 106 N. Y. Supp. 143.

The case of *Brown* v. *Rice* (1869), 57 Me. 55, 2 Am. Rep. 11, is a *leading case* on this subject according to the annotator in 44 A. L. R. The defendant was convicted of false pretense, and sentenced to 6 months' jail sentence. Nineteen days later the judge re-sentenced him to 3 years imprisonment in the penitentiary, which was within the limits fixed by the law for the violation of the said law. It was objected by the defendant that he was subjected to imprisonment twice for the same offense in violation of the state constitution. The Court said:

> "The cases certainly are as strong for the respondent as any that can be found, and recognize the right of the Court to go as far, at least, as we can find either reason or authority for going. But they stop at the point of execution, and clearly express or imply that after execution or warrant issued and executed, this power of summarily changing the record, or judgment, or sentence, is at an end. * * * If these proceedings were legal, it would seem that this prisoner must suffer punishment under two distinct sentences for the

same offense. If the judge could annul the first sentence as to its legality afterwards, he could not annul or restore the nineteen days of imprisonment suffered under it. If now he is to be sent to the state prison for three years more, not counting his time in jail under the first sentence, he certainly must suffer two distinct imprisonments under two distinct sentences given at a considerable interval of time, for the same offense, and under one indictment. We think that the sentence in question to the state prison was illegally imposed, and is void and cannot be carried out."

In the case of *People* v. *Meservey* (1889) 76 Mich. 223, 42 N. W. 1133, the defendants pleaded guilty of burglary, and were sentenced to be confined in the state prison for five years; on the next day, they were brought back before the court, and the judge entered on the docket sheet an order to the effect that the sentence was imposed under a misapprehension of the facts of the case, and, also, that the prisoners had not entered upon serving the term under the sentence, and that no part of the sentence had been executed, and the original sentence was set aside, and a greater sentence was imposed. The record showed that after the first sentence, the prisoners were remanded to the County jail in the custody of the Sheriff to be delivered to the State prison. Therefore, they spent one day in jail between the first and second sentences. The Court said:

"We also think that the original sentence had gone into effect, and that one day of imprisonment at Jackson, under the sentences, had passed at the time the order was made vacating them."

In the case of *Commonwealth* v. *Foster*, 122 Mass. 317, 23 Am. Rep. 326, 2 Am. Crim. Reports 499, where a trial court attempted to sentence a prisoner under one count of an indictment on which he was found guilty, after he had

served a part of a term of imprisonment under a sentence on another count in the indictment, the Court said:

> "The sentence might have been amended at the same term, and before any act had been done in execution thereof, *Comm.* v. *Weymouth*, 2 Allen (Mass.) 144, 79 Am. Dec. 776. But after the defendant had been imprisoned under it, and the term had been adjourned without day, the court could not amend it, or set it aside and impose a new sentence instead. * * * The result is that it was not in the power of the superior court, after rendering one judgment and sentence against the defendant, upon which he had been since imprisoned to order at a subsequent term that the case should be brought forward and another sentence imposed."

Where a court fined a prisoner $50.00, and committed him to jail until paid; and on the same day had him brought before him again and set aside that sentence, and imposed a fine of $200.00 and committed him to jail until paid, the court said the question was whether or not a court could increase the sentence after the original sentence went into effect, even during the same term. The court held that this could not be done.

A defendant was sentenced to two months; there was a motion to set aside the sentence and impose a larger one and of a different character. The court said:

> "The objection to the exercise of such power by the court is that, could it be exercised, a defendant in violation of his constitutional rights, might be punished twice for the same offense, first by undergoing imprisonment under the first sentence, and then by undergoing imprisonment on the second. * * * It is but fair and reasonable to presume that in the interim between the rendition and attempted annulment and vacation the defendant had, according to its terms, *either paid the fine* and costs imposed, or been held in custody by the sheriff in default of such payment. If so, *in*

either, even he had suffered some punishment under said judgment, and it was then, beyond the power of the court either to set it aside, vacate, annul, or change it in any substantial respect, unless at the instance or on motion of the defendant. * * * I am inclined to the view that this preliminary objection is well taken and sustained by authority. This view constrains me to deny the present motion." People *v.* Sullivan (1907) 54 Misc. 489, 106 N. Y. Supp. 143.

Where a defendant was sentenced to a term in the Boys' Industrial school for burglary under the impression that he was under 18 years of age, and it was later learned, after he had served some of the sentence, that he was over 18 years of age, the judge called him back, and sentenced him to the state prison for the same offense, the Court, after holding that the judgment, though erroneous in the first instance was legal, the court said:

"While a district court has ample authority to correct a judgment in a criminal case at the term of court at which it was rendered, or a subsequent term, to make the same conform to the one actually pronounced, it has no jurisdiction to vacate a judgment in a criminal case after the same has gone into effect by commitment of the defendant under it, and substitute for it another sentence at the same term of court. The power of a court to revise or change a judgment even in a civil case is at an end *even in a civil case is at an end* after the same is in process of execution. The last sentence was illegally imposed, and its enforcement is without authority of law. To sustain the second judgment would be to hold that a person can be twice punished by judicial proceedings for the same offense." In Re Jones, 35 Neb. 499, 53 N. W. 468, 469.

The most recent cases cited in A. L. R. Supplemental Decisions are: *People ex rel K.* v. *McK.*, 371 Ill., 190, 20 N. E. (2d) 498; *People* v. *S.*, 371 Ill. 627, 21 N. E. (2d) 763.

Some jurisdictions hold that the sentence may be set aside for the purpose of reducing the punishment; this is decided on the theory that to reduce the punishment does not subject the prisoner to double punishment. On the other hand, many jurisdictions hold that the judgment can not be set aside for the purpose of reducing the sentence, even. The highest court of Penn. in the case of *Commonwealth* v. *Mayloy* (1868) 57 Pa. 291, many years ago condemned this practice, even for the purpose of reducing the sentence, on the ground that the term of a convict would always be a matter of uncertainty with him, thereby eliminating to a great extent the effect of the punishment, and they say with reference to the power of a court to set aside a sentence and increase it:

> "It is not difficult to imagine times in which the rule might thus become despotic and most oppressive."

BENTON L. BRITNELL,
Decatur, Ala.,
Solicitor for Petitioner.

NEWTON B. POWELL,
Decatur, Ala.,
Of Counsel.